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BAC

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Levi Strauss & Co.

v.

Vivat Holdings PLC

Opposition Nos. 105,453 and 105,667

Gregory S. Gilchrist and Gia L. Cincone of Legal Strategies
Group for Levi Strauss & Co.

Anthony L. Fletcher of Fish & Richardson P.C. for Vivat
Holdings PLC.

Before Chapman, Holtzman and Rogers¹, Administrative
Trademark Judges.

Opinion by Chapman, Administrative Trademark Judge:

Levi Strauss & Co. has opposed two applications owned
by Vivat Holdings PLC (a United Kingdom company) to register
the marks shown below:

¹ Administrative Trademark Judge Rogers has been substituted for
Administrative Trademark Judge McLeod, who was on the panel at
the oral hearing but left government service before the case was
decided. See *In re Bose Corporation*, 772 F.2d 866, 227 USPQ 1
(Fed. Cir. 1985); and *Jockey International, Inc. v. Bette Appel
Unltd.*, 216 USPQ 359 (TTAB 1982). See also, TBMP §§802.04 and
803.

both for "articles of clothing: namely, shirts, jumpers, skirts, blouses, coats, jackets, wind resistant jackets, tracksuits, slacks, trousers, shorts, overalls, dungarees, sweaters, T-shirts, sweatshirts, blousons, jeans, belts, suspenders, ties, scarves, gloves, hats, caps, berets, headbands and hoods; articles of footwear: namely, shoes, boots, sandals, slippers, sneakers, athletic shoes, hosiery, tights, socks and stockings." Both applications were originally filed based on Section 44(d), but applicant changed the basis of both to assert its bona fide intent to use the marks in commerce under Section 1(b). Thus, the filing date of both applications is October 16, 1995.

As grounds for opposition, opposer made essentially the same allegations in its two notices of opposition, namely, that since long prior to applicant's filing date opposer has continuously used its registered "arcuate"⁴ trademarks shown below:

² Application Serial No. 74/607,082.

³ Application Serial No. 74/605,890.

⁴ Both applicant and opposer refer to opposer's trademark as its "Arcuate trademark." The Board takes judicial notice of The

on a variety of goods, including, but not limited to jeans, trousers, pants and shorts; that opposer expends "substantial time, money, and effort in promoting its Arcuate trademark to identify Opposer as the source of the goods" as a result of which the public has come to recognize opposer as the source of a variety of goods which display the arcuate trademark; that "Opposer has gained a valuable reputation for its Arcuate trademark and has developed exceedingly valuable goodwill with respect to that trademark"; that registration to applicant of its marks "will lead the public to conclude, incorrectly, that Applicant is or has been, and that Applicant's goods displaying said trademark are or have been, authorized,

American Heritage Dictionary definition of "arcuate" as "Having the form of a bow; curved; arched." See TBMP §712.01.

⁵ Registration No. 404,248, issued November 16, 1943, for "waistband type overalls"; republished under Section 12(c), Section 8 affidavit accepted, Section 15 affidavit acknowledged, renewed. The registration includes the following statement: "No claim is made to the exclusive use of the representation of a pair of overalls."

⁶ Registration No. 1,139,254, issued September 2, 1980, for "pants, jackets, skirts, dresses and shorts"; Section 8 affidavit accepted, Section 15 affidavit acknowledged.

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sponsored, or licensed by Opposer" in contravention of
Section 2(a) of the Trademark Act⁷; and that applicant's

⁷ Because opposer did not argue or otherwise refer to the issue under Section 2(a) (presumably a claim of false suggestion of a connection) in its brief on the case, that ground for opposition is deemed waived.

marks, if used on its goods, would so resemble opposer's previously used trademarks, as to be likely to cause confusion, mistake, or deception in contravention of Section 2(d) of the Trademark Act.

In its answers, applicant admits that there is no issue of priority, and that opposer's date of adoption and first use of its arcuate trademark long precedes applicant's filing date; and applicant otherwise denies the salient allegations of the notices of opposition.

Applicant's motion to consolidate the two oppositions was not contested, and because the cases involve the same parties as well as common questions of law and fact, the Board consolidated the proceedings on July 30, 1997.

The record consists of the pleadings; the files of the two opposed applications; trial testimony, with exhibits, taken by each party; notices of reliance filed by each party; one testimony affidavit submitted by stipulation of the parties; a stipulation of the admissibility of certain documents; and rebuttal trial testimony taken by opposer.⁸

⁸ Portions of the record were submitted as "confidential" and both parties filed their entire briefs on the case as "confidential." Opposer submitted redacted copies of its brief and reply brief, noting that only opposer's sales and advertising figures are considered "confidential." Applicant's attorney stated at the oral hearing that it had filed a public copy of its brief. Although the public copy of applicant's brief is not currently with the file, in this decision, we have discussed only that part of the evidence which appears clearly non-confidential.

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Both parties filed briefs on the case, and both parties were represented at the oral hearing before the Board on July 12, 2000.

We will first discuss the two pending motions to strike relating to the record.⁹ First, opposer's motion to strike the "references and depictions" on pages 7-8 of applicant's trial brief (all relating to back pocket stitching designs other than the arcuate stitching design which have been used by opposer) is denied. The Board does not generally strike arguments in a brief, but we will consider a party's objections and any improper portion(s) of a brief will be disregarded. See TBMP §540.

Applicant moved to strike Tab 42 of opposer's notice of reliance, which is a photocopy of two pages (the cover and the first page) of a book titled This Is A Pair Of Levi's Jeans...The Official History Of The Levi's Brand. Applicant contends, inter alia, that the two photocopied pages do not conform with opposer's statement of the relevance; and that the entire book is admissible only to show its existence, not the truth of the matter asserted therein. Opposer contends, inter alia, that a copy of the entire book was submitted to the Board, and was made available to applicant

⁹ On March 10, 2000 the Board issued an interlocutory order in which applicant's motion to strike was denied as to the deposition of Kip Machuca, and a decision on the remainder of applicant's motion was deferred until final hearing. The Board

during discovery; and that there is testimony to support the propositions for which the book was offered into evidence.

Notably, applicant has not stated that the book was not made available to applicant during discovery. Further, we note that one of the co-authors of the book, Lynn Downey, was deposed in this case, the book in question was discussed (see pp. 10-11, including that opposer would submit it under notice of reliance rather than as an exhibit to the testimony), and applicant's attorney cross-examined this witness. Because applicant's motion to strike Tab 42 attempts to raise form over substance, and in essence, relates more to the probative value of the evidence than the admissibility thereof, the motion to strike Tab 42 is denied. See TBMP §708, and cases cited therein.

Applicant also moved to strike Tabs 4-13 and 31 of opposer's notice of reliance, again arguing that these articles from printed publications are inadmissible insofar as the truth of the matters asserted therein is concerned. Again, this relates to the probative value of the evidence not the admissibility thereof. Applicant's motion to strike Tabs 4-13 and 31 is denied.

Finally, applicant moved to strike portions of the deposition testimony (and related exhibits) of Julia Hansen, taken January 8, 1999, and portions of the deposition

also deferred a decision on opposer's motion to strike a portion

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testimony (and one related exhibit) of Katherine Mary (Katy) Basile, taken January 12, 1999, on the basis that all of the involved testimony and exhibits relate to opposer's common law rights developed in its marks subsequent to applicant's filing date of its applications.¹⁰ Opposer contends that there is no question opposer has first use of its arcuate pocket stitch design mark since the late 1800s; that opposer's new lines of "vintage" jeans, which were introduced in the 1990s, simply duplicate opposer's historical uses of the arcuate stitch design mark, and are not new marks.

We agree with opposer that applicant's view of this testimony and evidence is overly narrow, especially as opposer is obligated to establish continuous use of its mark. Applicant's motion to strike the testimony and related exhibits of both Ms. Hansen and Ms. Basile is denied.

Both parties' motions to strike have been denied, but we hasten to add that the Board has considered the evidence only for appropriate purposes. As a final point on applicant's motion to strike, we would add that even if the

of applicant's brief.

¹⁰ Applicant refers to its application filing dates as December 5, 1994 for one application, and October 16, 1995 for its other application. Both of applicant's involved applications have filing dates of October 16, 1995, for the reasons discussed infra.

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involved testimony and evidence were excluded, we would reach the same result on the merits of this case.

Opposer is a clothing manufacturer, founded in the Gold Rush days in California, and its best known product is its denim jeans. Opposer has made jeans since the 1870s; and opposer began using the arcuate pocket stitching design in the late 1800s (around 1890) and it has been in continuous use since that time.¹¹

Applicant, also a clothing manufacturer, is a wholly owned subsidiary of Lee Cooper Group Limited (a United Kingdom company) (Lee Cooper). Lee Cooper's predecessor in interest was founded in the United Kingdom in 1908, manufacturing and selling overalls and dungarees. Lee Cooper itself was founded in 1956, and it sells jeans and casual wear in about 50 countries worldwide, but it does not sell its goods with the involved marks in the United States.

Because opposer owns valid and subsisting registrations of its pleaded mark, the issue of priority does not arise. See *King Candy Company v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974); and *Humana Inc. v. Humanomics Inc.*, 3 USPQ2d 1696 (TTAB 1987). Moreover, applicant admitted in its answer that it has not used its mark in the United States, and the evidence clearly proves

¹¹ The record shows that the precise form of opposer's pocket stitch design varied slightly due to a variety of factors, such

opposer used its involved mark long prior to the filing date of applicant's involved applications.

We turn then to the issue of likelihood of confusion. Our determination of this issue is based on an analysis of all the probative facts in evidence that are relevant to the factors bearing on likelihood of confusion. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). The factors deemed pertinent in this proceeding now before us are discussed below.

The first du Pont factors we consider are the similarity/dissimilarity of the parties' goods and the channels of trade. The Board is constrained to consider the goods or services of the parties as identified in the involved application(s) and/or registration(s). See *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); and *Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). In this case, the parties' goods are in part identical (jeans,¹² pants, jackets, skirts and shorts), and are otherwise related clothing items. Applicant does not seriously contend otherwise. The record

as hand sewing (automated machine stitching did not begin until the 1970s).

¹² Opposer's registrations include in the identifications of goods "waistband type overalls" and "pants," and applicant's applications include in the identifications of goods "jeans," "overalls," "dungarees," "slacks" and "trousers." The testimony clearly shows that the item "waistband type overalls" is today referred to as "jeans" or "blue jeans."

created in this case by both opposer and applicant unquestionably emphasizes the sale of jeans by both parties. Inasmuch as the respective identified goods are identical and/or related clothing items, they obviously would travel through the same, normal channels of trade to all the usual purchasers for such goods. See *In re Smith and Mehaffey*, 31 USPQ2d 1531 (TTAB 1994).

Turning next to a consideration of the marks, the similarity or dissimilarity of marks in appearance and commercial impression ultimately comes down to the "eyeball test." This is explained by J. Thomas McCarthy, at 3 McCarthy, McCarthy on Trademarks and Unfair Competition, §23:25 (4th ed. 2000) as follows (footnote omitted):

Because a picture is worth a thousand words, there is little in the way of guidelines to determine the degree of visual similarity which will cause a likelihood of confusion of buyers. Obviously, for picture and design marks (as opposed to word marks), similarity of appearance is controlling. There is no point in launching into a long analysis of the judicial pros and cons regarding visual similarity of marks. Regarding visual similarity, all one can say is 'I know it when I see it.'"

There is no evidence of record to indicate that the respective pocket stitching design marks involved herein are anything other than arbitrary in relation to jeans and other clothing items.

It is true that applicant's and opposer's pocket stitching design marks are not exactly the same. However, in comparing the design marks in their entireties (rather than by comparing individual features and lines) we are of the opinion that the overall commercial impression created by applicant's marks and opposer's mark is similar. When we do focus on particulars, it is obvious that opposer's mark consists of two parallel lines beginning at the sides of the pocket and curving up and then down to meet in the middle portion of the pocket; while applicant's mark consists of two lines beginning closer together at the sides of the pocket and curving up and then down and intersecting very close to the middle portion of the pocket. Despite these minor differences, there is no doubt that the overall impression and perception of both marks is that of a curved or arched set of two lines, and would be so perceived by purchasers.

The differences are not likely to be recalled by purchasers seeing the marks at separate times. The emphasis in determining likelihood of confusion is not on a side-by-side comparison of the marks, but rather must be on the recollection of the average purchaser, who normally retains a general, rather than a specific, impression of the many trademarks encountered. Further, the purchaser's fallibility of memory over a period of time must also be

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kept in mind. See *Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller*, 477 F.2d 586, 177 USPQ 573 (CCPA 1973); *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467 (TTAB 1988); and *Edison Brothers Stores v. Brutting E.B. Sport-International*, 230 USPQ 530 (TTAB 1986).

The parties' respective pocket stitching design marks are sufficiently similar in appearance and commercial impression that, when they are used in connection with the goods identified in opposer's registrations and applicant's applications, consumers are likely to be confused. See *Kangol Ltd. v. KangaROOS U.S.A. Inc.*, 974 F.2d 161, 23 USPQ2d 1945 (Fed. Cir. 1992); *In re Calgon Corp.*, 435 F.2d 596, 168 USPQ 278 (CCPA 1971); and *Puma-Sportschufabrieken Rudolf Dassler KG v. Garan, Inc.*, 224 USPQ 1064 (TTAB 1984). Cf., e.g., *Lacoste Alligator S.A. v. Everlast World's Boxing Headquarters Corporation*, 204 USPQ 945 (TTAB 1979).

"Where the goods and services are directly competitive, the degree of similarity required to prove a likelihood of confusion is less than in the case of dissimilar products." 3 J. McCarthy, McCarthy on Trademarks and Unfair Competition, §23:20.1 (4th ed. 2000). See also, *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

Considering next the du Pont factor of the conditions under which, and the buyers to whom, sales are made,

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clothing items such as jeans are ordinary consumer items sold to the general public. Applicant conceded in its brief that "[opposer] is probably correct that jeans purchasers are not notably sophisticated, and that jeans purchases are 'not momentous to most buyers'." (Applicant's brief, p. 35).

However, applicant contends that because jeans are generally marketed with multiple trademarks (for example, opposer's jeans generally carry a LEVI'S label, the LEVI'S red tab attached to the side of the right rear pocket, one of the "two horses pulling a pair of jeans" labels, the arcuate stitching on the rear pockets), it is "quite impossible" (brief, p. 36) for a purchaser seeing applicant's jeans pocket stitching design to believe that applicant's goods were manufactured by opposer.

To the extent applicant is arguing that the parties' use of their respective housemarks will avoid confusion in the real marketplace, this is not determinative of the issue before us. Applicant has not applied to register a pocket stitching design accompanied by the housemark LEE COOPER, but rather a pocket stitching design per se. Also, opposer's registrations are for its pocket stitching design alone, without opposer's housemark LEVI'S. Our determination of likelihood of confusion must be based on

the specific marks at issue. See *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, footnote 4 (Fed. Cir. 1993); and *Interstate Brands Corp. v. McKee Foods Corp.*, 53 USPQ2d 1910 (TTAB 2000). That is, the presence of additional labeling does not affect the degree of similarity between the parties' two stitched pocket designs in issue before us. See generally, *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 631 F. Supp. 735, 228 USPQ 648 (SDNY 1985).

Further, the fact that jeans are frequently marketed with multiple trademarks (i.e., labels, sewn-on tabs, pocket stitching designs) does not negate the trademark value of any of the separate trademarks. That is, the use of multiple trademarks on a product does not diminish the role of any of the separate trademarks. See 1 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, §§7:2 and 7:5 (4th ed. 1999). In fact, in this case, opposer's arcuate design mark is emphasized on opposer's labels¹³, and it is separately registered.

Another du Pont factor we consider in this case is the strength of opposer's mark. Opposer has clearly

¹³ For example, the bottom edge of opposer's "housemark" LEVI'S label mimics opposer's arcuate design; the bottom edge of opposer's 501 label also mimics the arcuate design, and this 501 label also reproduces the parallel double stitching design in print along the bottom edge, has two hands pointing toward the bottom edge, and includes a statement referring to the stitched pocket design as a trademark of opposer and to help the consumer identify garments made only by Levi Strauss & Co.; and the "two horse" label includes the words "original riveted" inside a banner in the shape of opposer's arcuate design.

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demonstrated that its mark is very strong and well-known for clothing, especially jeans, through, at a minimum, (1) opposer's use of the arcuate stitching design for over 100 years; (2) opposer's very significant annual volume of sales of jeans carrying the arcuate stitching trademark (both in dollar amount and in number of units sold); (3) opposer's very significant annual advertising expenditures for a variety of advertising mediums, such as television and magazines (both nationwide);¹⁴ and (4) public awareness of opposer's mark, as evidenced by (i) testimony that about 90-95% of all men in the United States own at least one pair of LEVI'S jeans and about one-third of that for women in the United States (Steve Goldstein, opposer's vice president of marketing and research-retired, dep., p. 12); and (ii) media stories about opposer which feature or include reference to opposer's involved mark.¹⁵ We find that opposer's well-

¹⁴ Inasmuch as opposer's sales and advertising figures were filed under seal as "confidential," we cannot utilize the exact figures in this decision. However, suffice it to say that in the nine year period from 1989-1997 opposer's sales were extremely substantial; and opposer's advertising expenditures were likewise extremely substantial each year.

¹⁵ We did not consider the media stories for the truth of the matter asserted therein because in that context they are hearsay. See *Logicon, Inc. v. Logisticon, Inc.*, 205 USPQ 767, footnote 6 (TTAB 1980), and TBMP §708. However, the media stories were considered for what they show on their face, which includes nationwide exposure of opposer's mark to the public. (Even if we had not considered the media stories at all, the record contains sufficient evidence to establish that opposer's mark is strong and well-known.)

Further, we note that in determining that opposer's mark is a strong mark, we have not relied on opposer's evidence of

known pocket stitching design mark is entitled to a broad scope of protection.¹⁶ See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); and *Henry Siegel Co. v. M & R International Mfg. Co.*, 4 USPQ2d 1154, 1161 (TTAB 1987).

However, we are reluctant to treat opposer's arcuate shaped pocket stitching design mark as "famous" on the record before us. This is because we are aware that opposer's sales and advertising figures and to some extent public recognition, is affected by the fact that there are multiple marks on opposer's jeans and other clothing items. Thus, it is difficult to attribute any particular percentage of the extremely significant sales/advertising figures to the arcuate stitching mark alone. We could only speculate as to the sales/advertising figures in relation to only the involved arcuate design mark, and the actual impact of opposer's arcuate mark alone on the minds of consumers. See *Fossil Inc. v. Fossil Group*, 49 USPQ2d 1451, 1457 (TTAB 1998); and *General Mills Inc. v. Health Valley Foods*, 24 USPQ2d 1270, 1277 (TTAB 1992).

"judicial recognition" of opposer's arcuate stitching design mark. (See, e.g., the *Lois Sportswear* case, *supra*.)

¹⁶ Even applicant's director and company secretary, Alan Richards, testified as follows (p. 57):

Q. Do you know of any other stitching design anywhere in the world that is more recognized by the arcuate jean design?

A. Strictly, I don't know, but it is a well-recognized mark.

Q. Would you consider it famous?

A. I think yes.

Considering next the du Pont factor of the number and nature of similar marks on similar goods, there is no question that numerous third-parties use pocket stitching designs on jeans.¹⁷ (See, e.g., the testimony of Laurie A. Buchanan, a trademark paralegal in applicant's attorney's law firm; and Jana L. Jones, patent practice systems coordinator in applicant's attorney's law firm.) However, at trial, one of opposer's in-house attorneys, Katherine Mary (Katy) Basile, testified as to opposer's extensive policing and enforcement of its rights in its arcuate trademark, including testimony that, since she assumed responsibility for this area, opposer has undertaken about 200 enforcement actions involving the arcuate trademark in the United States. Further, on rebuttal, Ms. Basile addressed virtually all of the third-party uses submitted by applicant, explaining that several of the designs have been discontinued by agreement or court order; a few are currently the subject of pending action by opposer; some were not previously known to opposer, but will be challenged by opposer; some are under review by opposer to

¹⁷ Applicant also introduced into evidence a copy of one third-party registration. Third-party registrations evidence neither use in the marketplace, nor understanding and perception by the public of such marks. See *Helene Curtis Industries, Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618 (TTAB 1989). In any event, the third-party registration (No. 1,761,436) made of record by applicant was subsequently amended by the registrant deleting the pocket outline and the pocket stitching design previously shown therein.

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determine whether to challenge them; and several are designs (e.g., parallel flat/straight lines) which opposer does not believe are confusingly similar to opposer's arcuate mark. Certainly, this record does not establish "widespread, significant and unrestrained use by third-

parties," especially inasmuch opposer vigorously enforces its rights as against third-parties. See *Miles Laboratories Inc. v. Naturally Vitamin Supplements Inc.*, 1 USPQ2d 1445, 1462 (TTAB 1986) (amended 1987).

To the extent applicant may have demonstrated a few unchallenged and arguably relevant third-party uses, nonetheless, applicant has not introduced evidence as to the duration or extent of these third-party uses. Moreover, even if there are a few actual uses by third parties of marks which are arguably similar to opposer's arcuate pocket stitching design mark, this does not necessarily detract from opposer's use of and the public perception of opposer's well-known arcuate mark, which has over 100 years of commercial history, as discussed above.

The commercial real world does not have to be a completely clean slate in order for a trademark owner to prevail in a proceeding regarding registrability.¹⁸

Having found that opposer's pocket stitch design mark in the case now before us is a strong, well-recognized trademark, the cases cited by applicant relating to the weakness of various stripe designs on athletic shoes [e.g.,

¹⁸ In an analogous situation, but relating to a "family" of marks, the Court of Customs and Patent Appeals stated long ago that "[a]s a matter of logic it would seem to us that if opposer has a family of six marks all starting with the non-descriptive word 'Golden,' it still has that family notwithstanding there may be some others using the same word to some undisclosed extent." *Motorola, Inc. v. Griffiths Electronics, Inc.*, 317 F.2d 397, 137 USPQ 551, 553 (CCPA 1963).

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In re Lucky Company, 209 USPQ 422 (TTAB 1980)], are inapposite.

Turning to the du Pont factor of actual confusion, applicant acknowledges that because applicant does not use its involved marks in the United States, there has been no opportunity for actual confusion. (Brief, p. 41). However, applicant argues that opposer has not shown any actual confusion between opposer's arcuate stitching design and any other pocket stitching design mark. Applicant offered no authority, and we find none, for the proposition that a plaintiff need establish in any way actual confusion between itself and third parties. (In fact, if a plaintiff offered such evidence, the defendant could argue that the evidence is irrelevant regarding the likelihood of confusion between plaintiff's and defendant's marks.) This du Pont factor, actual confusion, is simply neutral or not relevant in this case where applicant is not using its marks in the United States.

Applicant argues there is an additional factor in this case, specifically, that opposer has not shown applicant's intent to cause confusion in adopting these two marks. The record shows that around mid 1994 when applicant redesigned its LEE COOPER logo, applicant also decided to redesign the pocket stitching mark; that applicant was aware of opposer's arcuate stitching design; and that some proposed

designs, upon the advice of applicant's director and company secretary, Alan Richards, were changed specifically to avoid possible confusion with opposer's arcuate mark. We agree with applicant that there is no evidence of applicant's intent to cause confusion in this case. Nonetheless, this factor is of little weight in this case because, as stated by the Court of Appeals for the Federal Circuit (our primary reviewing court), in *J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 18 USPQ2d 1889, 1891 (Fed. Cir. 1991): "Whether there is evidence of intent to trade on the goodwill of another is a factor to be considered, but the absence of such evidence does not avoid a ruling of likelihood of confusion. (citation omitted)."

Applicant's arguments that opposer itself has used other pocket stitching designs; and that opposer's arcuate stitching design does not appear on every pair of jeans manufactured by opposer¹⁹ are not persuasive of a different result in this case.

We find that, based upon a consideration of all relevant du Pont factors, confusion as to source is likely between applicant's pocket stitching design mark and opposer's previously used and registered pocket stitching

¹⁹ The record shows opposer's arcuate mark is on approximately 80-90% of the jeans manufactured by opposer. (Goldstein dep., pp. 8-9.)

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design mark if these marks are used in connection with these identical goods sold to the general public.

Decision: The oppositions are sustained, and registration to applicant is refused in each application.